INDEX

	Page
Opinions of the Lower Courts	1
Jurisdiction	1
Statement of the Case	2
Argument:	
I. No substantial question requiring a construction of the treaty is involved:	
(*a*) The seizure was not made for an alleged violation of the conspiracy statute, but upon grounds obviously authorized by the treaty	14
(*b*) The treaty did not deprive the district court of jurisdiction of the persons of the defendants or of the offense charged in the indictment	17
(*c*) The question of whether the seizure was within treaty limits was one of fact decided against the defendants by both courts below	19
(*d*) The treaty does not require that the speed of the communicating vessel be determined under substantially identical conditions	19
II. Contentions not based upon treaty:	
(*a*) The admission or exclusion of evidence is for the court	21
(*b*) Evidence respecting the "Norburn," the marked dollar bills, and the telegram of Belanger	22
Conclusion	29

AUTHORITIES CITED

Cases:	
Adams v. *New York*, 192 U. S. 585	18
Brolaski v. *United States* (C. C. A., 9th), 279 Fed. 1	18
Brown v. *Elliott*, 225 U. S. 392	18
Cook v. *Hart*, 146 U. S. 183	18
Hyde v. *United States*, 225 U. S. 347	18
Jianole v. *United States* (C. C. A., 8th), 299 Fed. 496	18
Ker v. *Illinois*, 119 U. S. 436	18
Latham v. *United States* (C. C. A., 4th), 2 F (2d) 208	18

Cases—Continued.	Page
Lucas v. *United States* (C. C. A., 8th), 275 Fed. 405	18
Mahon v. *Justice*, 127 U. S. 700	18
Over the Top, The, 5 F. (2d) 838	20
Pettibone v. *Nichols*, 203 U. S. 192	18
Rudner v. *United States* (C. C. A., 6th), 281 Fed. 516	18
Steele v. *United States No. 2*, 267 U. S. 505	21–22
Statutes:	
Act of February 16, 1919, c. 48 (amending Section 269, Judicial Code), 40 Stat. 1181	28
Title II, 41 Stat. 305	2, 24
Act of October 28, 1919, c. 85 (National Prohibition Act), Section 3	3
Act of September 21, 1922, c. 356 (Tariff Act of 1922), 42 Stat. 858; Section 593 (4), subdivision (b)	2, 3, 24
Act of February 13, 1925, c. 229 (amending Section 240, Judicial Code), 43 Stat. 936	2
Constitution of the United States—	
Fourth Amendment	5, 6
Fifth Amendment	5, 6
Sixth Amendment	13
Eighteenth Amendment	4
Criminal Code, Section 37	4, 13, 16
Magna Charta	4
Revised Statutes, Section 731	13
Supreme Court Rules: Rule 35, Par. 5 (b)	23
Treaty with Great Britain, May 22, 1924	2, 3, 5
Article II, Par. (1)	14
Article II, Par. (2)	15
Article II, Par. (3)	15, 19

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 1045

GEORGE FORD, GEORGE HARRIS, J. EVELYN, VINCENT Quartararo, and Charles H. Belanger, Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS OF THE LOWER COURTS

An opinion by the District Court upon the motion to suppress the seized evidence is reported in 3 F. (2d) 343. The opinion of the Circuit Court of Appeals has not yet been officially reported. It will be found, however, on pages 840–867 of the record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 4, 1926 (R. 868–869), and re-

hearing denied February 8, 1926 (R. 869–871). The grounds upon which the petitioners rely for the allowance of a writ of certiorari are set forth on pages 5–8 of their petition. Jurisdiction to issue the writ is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 936, 938).

STATEMENT OF THE CASE

Petitioners were jointly indicted, together with fifty-five others, in the District Court of the United States for the Northern District of California, under Section 37 of the Criminal Code, for having conspired "at the Bay of San Francisco" to violate the National Prohibition Act, the Tariff Act of 1922, and the Treaty with Great Britain of May 22, 1924, by importing, bringing into, selling, and transporting within the United States certain intoxicating liquors for beverage purposes.

As overt acts in furtherance of the alleged conspiracy the indictment charged, among other things, that the defendants on September 10, 1924, caused the Canadian Steamer *Quadra* to leave the port of Vancouver, British Columbia, with a cargo of 12,000 cases of intoxicating liquors and to proceed with her cargo to a point opposite and within twelve miles of the Farallone Islands, which distance it was alleged could be traversed in one hour by said steamer and by motor boat *C–55,* for the purpose of unloading, importing, and bringing said intoxicating liquors into the United States for bev-

erage purposes; that the defendants did then and there, with the unlawful purpose mentioned, unload a portion of the intoxicating liquors from the *Quadra* to the motor boats *903–B, C–55, Marconi, California, Ocean Queen,* and other motor boats to the grand jurors unknown, and that said intoxicating liquors were brought by said motor boats into the United States, in violation of Section 3 of the National Prohibition Act, of Section 593 (4), Subdivision (b), of the Tariff Act of 1922, and of the Treaty with Great Britain of May 22, 1924. (R. 5–18.)

The defendants named in the indictment included George Ford, Master; George Harris, First Officer; and J. Evelyn, Second Officer, of the *Quadra,* as well as certain members of the crew of that vessel; four persons apprehended by Coast Guard officers in motor boats containing intoxicating liquors which were traced to the *Quadra* or to the *Coal Harbour,* another vessel stationed off the coast of California for a similar illegal purpose; one Charles H. Belanger, a director in The Consolidated Exporters, Limited, of Vancouver, which owned the cargo, and one Vincent Quartararo, who was alleged by the Government to have been one of the San Francisco agents of the cargo-owning corporation who handled the liquor as it was landed in the city and who was a party to the system in which clipped one-dollar bills were used, one portion of which, containing a written order upon the master of the *Quadra* to deliver intoxicating liquor, was deliv-

ered to the motor boat in San Francisco, and the other portion conveyed to the master by other means to enable him to verify the orders. (R. 9–11; 90–92.)

The defendants demurred to and filed a motion to quash the indictment, assigning the following principal grounds: (1) That the court had no jurisdiction of the subject matter of the indictment or of the persons of the defendants because all the acts charged in the indictment were alleged to have been committed beyond the territorial limits of the United States; (2) that the Treaty with Great Britain was unlawful because it was in violation of the Eighteenth Amendment, and because His Britannic Majesty was without power to waive thereby the rights of any of his subjects guaranteed to them by Magna Charta or by the basic laws of Great Britain, and (3) that the treaty was void because violative of the laws of the United States and was not part of the laws of the United States. Other grounds raised in the demurrer or in the motion to quash were that the indictment failed to state facts sufficient to charge a conspiracy under Section 37; that the indictment was bad for duplicity, in that it charged a conspiracy to commit three separate offenses "having little or no connection with each other"; that it was bad also for uncertainty in various respects; that it did not apprise the defendants of the charge they were called upon to meet; and that another indictment, No. 15,829, charging the same offenses, was pending against

the defendants, except the defendant Quartararo. (R. 19-28, 28-31.)

Prior to trial the defendants by a "Motion to Exclude and Suppress Evidence" set up that the *Quadra* was a vessel of British registry, not owned in whole or in part by any American citizen, and having a speed of nine miles an hour; that at 11.20 a. m. on October 12, 1924, she was stationed at a point off the Farallone Islands at a greater distance than twelve miles from the coast of the United States, its territories or possessions, and at a greater distance therefrom than could be traversed in one hour by the *Quadra* or by the motor boats *906-B, C-55, Marconi, California,* or *Ocean Queen;* that at such time and place, in violation of the law of nations and of the Treaty with Great Britain, without any violation of the laws of the United States having been committed by any of the crew, and in violation of the defendants' rights guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States, the *Quadra* was seized, in the name of the United States, by a prize crew of the Coast Guard Cutter *Shawnee* and with her cargo and crew taken into the port of San Francisco "as evidence of violations of certain laws of the United States in the indictment on file herein more particularly set forth." The motion further alleged that the United States Attorney and other officers of the Federal Government proposed to use the *Quadra* and her cargo, as well as certain facts relating to

the seizure thereof, as evidence in the case against the defendants, and that such use would violate the defendants' rights as British subjects under the law of nations, the treaty, and the Fourth and Fifth Amendments. (R. 32–38.)

In opposition, Lieutenant Commander C. F. Howell, captain of the Coast Guard Cutter *Shawnee,* filed an affidavit stating that he was in charge of the *Shawnee* at the time and place in question; that at his command the *Quadra* and the motor boat *C–55* were seized and brought into the port of San Francisco and turned over to the Customs Branch of the Treasury Department; that at said time and place the *Quadra* and said motor boat were less than twelve miles from the coast of the United States and at a distance from such coast which could be traversed in less than one hour by the *Quadra* and by motor boat *C–55;* and that at said time and place the *Quadra* and said motor boat were transporting intoxicating liquor. (R. 39–40.) By an order filed January 5, 1925, the court overruled the demurrer, the motion to quash, and the motion to exclude the evidence. (R. 41.) The reasons assigned by the court for this action were stated in an opinion reported in 3 F. (2d) 343. (See also, R. 42–58.)

At the trial, the defendants objected to the introduction of evidence relating to the seizure of the *Quadra* on the ground that such seizure was unlawful because at variance with the Treaty. Stating that the question of the reception or rejection of

evidence was one of law for the court, rather than of fact for the jury (R. 110, 134), the court received considerable evidence concerning the circumstances under which the seizure was made. The Government's evidence on this point was directly contradictory to that of officers of the *Quadra.* For the Government, Captain Howell of the *Shawnee* testified that by means of compass calculations made by him, as well as by soundings made at his direction by Ensign Morse, an officer of his crew, each of said bearings being verified by the other officer, he ascertained the true position of the *Quadra* at the time of the seizure to be 5.7 nautical miles from the most northern of the North Farallone Islands (R. 105–106, 116, 139); that when he first sighted the *Quadra* she appeared to be hove to, but turned and began to move slowly offshore as he bore down on her; that upon his giving four blasts of his whistle as a signal that he wished to speak to her, she stopped; that prior to the seizure as he passed under the stern of the *Quadra* he observed the motor boat *C–55* about two hundred yards distant from that vessel steaming away from her side and headed offshore; that he signaled the motor boat to stop and upon her failing to respond, fired a shot across her bow whereupon she rounded to and came up alongside the *Shawnee;* that the *C–55* was occupied by two of the defendants in the present action and contained a number of filled sacks with the word " Corby " painted upon them,

as well as a partly filled case of beer bottles, and that said motor boat was made fast to the *Shawnee* and the men occupying it placed under arrest and taken aboard that vessel (R. 93–96, 135).

Captain Howell further testified that he thereupon had a conversation with Captain Ford of the *Quadra* (R. 98), in which the latter invited him to go aboard the *Quadra* and check the bearings of that vessel (R. 119–120, 124); that the witness did not see fit to accept that invitation as he was satisfied of his own position and was lying practically alongside of the *Quadra* (R. 124); that the witness informed Captain Ford that the latter was lying too far in and that he, the witness, was going to take him into San Francisco (R. 99); that the witness thereupon sent Ensign Osterman and Boatswain Patterson to examine the papers of the *Quadra,* but that those officers subsequently hailed the witness and told him that Captain Ford refused to exhibit his papers until he had consulted with counsel; that the witness then directed said officers of his crew to take charge of the *Quadra,* and that as Captain Ford refused upon request to steam in, a line was put aboard the *Quadra* and she and her cargo were towed into the port of San Francisco by the *Shawnee* and turned over to the customs officers (R. 101–105).

The testimony of Captain Howell, as above described, was fully corroborated by Ensign Morse of the *Shawnee.* (R. 141–144, 146, 149.) August Anderson, a member of the Coast Guard for over

thirty-two years and having the rank of Chief Boatswain, testified for the Government that on the afternoon of February 17, 1925, he made a test of the speed of the *C–55* by running her several times over a fixed course in San Francisco Bay; that no preparations for the test were made other than boiling the engine and taking water out of the bilges; that at the time of the test the motor boat had no cargo, but had three persons on board, and that the result of the test showed the average speed of the *C–55* to be 6.6 knots an hour. (R. 159–163.) This testimony was admitted over the objection that under the treaty such a test must be made under precisely the same conditions as existed at the time the offense was committed, the District Judge stating that he did not agree at all with the theory of the District Court of Connecticut, which had so held. (R. 162.)

For the defendants, George Harris, first officer of the *Quadra,* testified that a few minutes before the seizure of the *Quadra* he had completed taking the position of that vessel and had found it to be 37: 49½ N., 123: 22½ W. (R. 333), and that the *Quadra* when lying off the Farallones was at no time within twelve miles of any United States possession (R. 348). He frankly admitted that intoxicating liquor was unloaded over the side of the *Quadra* while she was lying outside the Farallones by members of the crew under his supervision, but excused that action on the ground that he was carrying out orders of the master. (R. 339.) J. Evelyn,

second officer, testified that he had made certain observations of the position of the *Quadra* at various times while she was being towed in to San Francisco, which testimony, assuming it to be true, would indicate that the *Quadra* was more than twelve miles out from any shore of the United States at the time of her seizure. (R. 405–406.) Objection was sustained, however, to further testimony by this witness as to his checking up the bearings made by First Officer Harris, on the ground that all he could testify to in this regard was that he saw the calculations made by someone else. (R. 408.) Evelyn also admitted, on direct examination for the defense, that under the direction of Mr. Harris he had supervised the unloading of intoxicating liquors from the *Quadra* to small boats off the Farallones. (R. 412.)

In its charge to the jury the court instructed, among other things, that all the evidence relating to the position of the *Quadra* at the time of the seizure was admitted for the information of the court, in order that it might determine the questions of law whether that evidence was properly admissible and whether the court had jurisdiction of the offense and of the persons of the defendants; that the court had determined those matters and that they were not before the jury at all. (R. 602–603.) The jury returned a verdict finding the petitioners here and five others of the defendants guilty as charged. (R. 74–75.) Following the overruling of motions for a new trial and in arrest of judgment (R. 649),

the court sentenced Ford, Belanger and Quartararo to two years imprisonment in the Penitentiary at Leavenworth, and additionally sentenced Ford to pay a fine of $1,000 and Belanger and Quartararo to pay a fine of $10,000 each. It imposed upon Harris a penitentiary sentence of thirteen months at Leavenworth and upon Evelyn a sentence of eight months in the San Francisco County Jail, without any accompanying fine. The remaining convicted defendants were given jail sentences or fines. (R. 79–81.)

Upon writs of error sued out by the defendants, the Circuit Court of Appeals affirmed the judgment (R. 868–869), holding in part: (1) That there could be no criminal offense in violating the Treaty with Great Britain, but that the reference in the indictment to such violation might be rejected as surplusage and the indictment still state facts sufficient to constitute a crime; (2) that the defendants being in court, the District Court had jurisdiction of them regardless of whether their apprehension had been lawful or otherwise; (3) that the evidence was sufficient to warrant the conclusion that about May 1, 1924, the defendant Quartararo entered into a conspiracy, within the Northern District of California, with the defendant Sam Crivello (who appeared as a witness for the Government) to import and possess intoxicating liquor; that the defendant Belanger and his corporation either had an understanding at that time with Quartararo or shortly thereafter became

parties to the conspiracy, and that the departure of the *Quadra* with her cargo from Vancouver on September 9, 1924, was pursuant to that conspiracy; (4) that a conspiracy may be prosecuted either at the place where it was formed or where an overt act in pursuance thereof is committed; (5) that the question arising during the trial of the position of the *Quadra* at the time of its seizure was a question of the admissibility of evidence and therefore a question of law for the court; (6) that the evidence was conflicting as to the place of seizure, but that as the District Court heard and saw the witnesses the Circuit Court of Appeals could not say on the record before it that the trial court had erred in holding that the defendants had not sustained the burden of proving that the seizure was illegal, and (7) that under the treaty a test of the speed of a communicating vessel need not be under circumstances substantially identical with those existing at the time of the seizure. (R. 840–867.)

Petitioners ask a writ of certiorari to review the judgment of the Circuit Court of Appeals upon the following grounds:

> 1. That evidence relating to the seizure was improperly admitted, because the treaty does not authorize a seizure beyond the three-mile limit for an alleged violation of the conspiracy statute, even though the conspiracy charged may be to violate laws of the United States prohibiting the importation of alcoholic beverages.

2. That under the treaty the speed of the communicating vessel must be determined under conditions substantially similar to those existing at the time of the seizure.

3. That the demurrer to the indictment should have been sustained, because the treaty permits seizures of British vessels only for adjudication of the vessel and does not permit a criminal prosecution of British citizens arrested beyond the territorial waters of the United States.

4. That assuming the treaty permits the criminal prosecution of British subjects on a British vessel seized thereunder, nevertheless the question of whether the seizure was within treaty limits was one of fact for the jury.

5. That irrespective of the treaty, the case involves an important question of criminal law which should be decided by this Court, viz, Whether a conspiracy under Section 37 may be committed by officers of a British vessel outside the territorial limits of the United States.

6. That irrespective of the treaty, the Circuit Court of Appeals has decided an important question of federal law which has not but should be determined by this Court, viz, Whether in view of the requirements of the Sixth Amendment and of Section 731 of the Revised Statutes, permitting the prosecution in either district of an offense begun in one district and completed in another, the instant prosecution could be maintained in the Northern District of California against pe-

titioners Ford, Harris, and Evelyn, when the evidence showed that all the acts committed by said petitioners were committed in Canada or on the high seas without the territorial limits of the United States.

7. That irrespective of the treaty, the Circuit Court of Appeals has decided important questions of general law in a way probably untenable and in conflict with the weight of authority, by affirming the action of the District Court: (*a*) In admitting evidence of another conspiracy between the same parties relating to the landing of liquor from the ship *Norburn*, which was a conspiracy different from that charged in the indictment relating to the *Quadra;* (b) in admitting in evidence certain dollar bills with markings thereon tending to show large purchases of liquor of the defendant Quartararo, in the absence of any evidence connecting such dollar bills with the case on trial, and (*c*) in admitting in evidence a telegram purporting to relate to purchases of liquor by the defendant Belanger, although that telegram was not shown to relate to the conspiracy charged.

ARGUMENT

I

NO SUBSTANTIAL QUESTION REQUIRING A CONSTRUCTION OF THE TREATY IS INVOLVED

(a) The seizure was not made for an alleged violation of the conspiracy statute, but upon grounds obviously authorized by the treaty

Article II, paragraph (1), of the treaty expressly authorizes, first, the boarding of a private vessel

under the British flag by authorities of the United States out of the territorial limits of the United States, its territories, or possessions, in order that inquiries may be addressed to those on board and an examination made of the ship's papers to ascertain whether the vessel, or those on board, are endeavoring to import or have imported alcoholic beverages into the United States, its territories, or possessions, in violation of the laws there in force; and second, a search of the vessel when such inquiries and examination show a reasonable ground for suspicion.

Paragraph (2) provides:

> If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories, or possessions prohibiting the importation of alcholic beverages, the vessel may be seized and taken into a port of the United States, its territories, or possessions for adjudication in accordance with such laws.

Paragraph (3) states, first, that such seizure can take place only within the distance from the coast of the United States, its territories, or possessions, that can be traversed in one hour by the suspected vessel, and then declares:

> In cases, however, in which the liquor is intended to be conveyed to the United States, its territories, or possessions by a vessel other than the one boarded and searched, it

> shall be the speed of such other vessel and not the speed of the vessel boarded which shall determine the distance from the coast at which the right under this article can be exercised.

Petitioners' first contention is that the seizure of a British vessel is authorized by the foregoing treaty provisions solely for the purpose of taking such vessel into a port of the United States "for adjudication in accordance with such laws," that is, in accordance with the laws of the United States, its territories, or possessions, prohibiting the importation of alcoholic beverages, and therefore that the treaty did not authorize the seizure of the *Quadra* for an alleged violation of Section 37 of the Criminal Code. In answer to this, it is sufficient to point out that there is nothing in the record upon which to base the assumption that the seizure of the *Quadra* was for a past, present, or intended violation of the conspiracy statute. The treaty does not require the seizing officer to state the grounds upon which he made the seizure, nor were such grounds stated by Captain Howell, other than that the *Quadra* was within treaty limits. At the time of the seizure Captain Howell undoubtedly had reasonable ground for belief that the *Quadra,* or those on board of that vessel, had committed, were committing, or were attempting to commit, a violation of the laws of the United States prohibiting the importation of alcoholic beverages, first, because that vessel attempted to get away when the

Shawnee was observed approaching; second, because of the circumstances under which the communicating motor boat *C–55*, with her cargo of intoxicating liquors were seized, and, third, because of the refusal, contrary to the terms of the treaty, of the master of the British vessel to permit an examination of his ship's papers by officers from the *Shawnee*.

(b) The treaty did not deprive the District Court of jurisdiction of the persons of the defendants or of the offense charged in the indictment

The Government is not attempting here to adjudicate what disposition shall be made of the vessel; the present indictment involves only a criminal charge against the defendants. If, as above stated, the seizure was based upon grounds sanctioned by the treaty, the fact that the officers and crew of the seized vessel accompanied it when it was brought into the port of San Francisco for adjudication under the laws of the United States specified in the treaty, was sufficient to bring those persons within the jurisdiction of the court of that district to answer any indictment which might be filed against them in that court. The treaty in no way restricts the jurisdiction of our courts over the persons of the officers and crews of British vessels. Even if it did and the officers and members of the crew of the *Quadra* who were defendants in this case had been taken into custody in contravention of the treaty, nevertheless those persons being in court to answer the charge there pending against them, the juris-

diction of the court would not be impaired by the manner in which their presence was obtained.

Ker v. *Illinois,* 119 U. S. 436, 444.
Mahon v. *Justice,* 127 U. S. 700, 708–715.
Cook v. *Hart,* 146 U. S. 183, 190.
Adams v. *New York,* 192 U. S. 585, 596.
Pettibone v. *Nichols,* 203 U. S. 192, 212–213.

The District Court also had jurisdiction of the subject matter of the offense charged, first, because the treaty places no restriction upon the jurisdiction of our courts over offenses which do not involve an adjudication of the vessel, and second, because, as pointed out by the Circuit Court of Appeals, *there was evidence sufficient to warrant the finding that the conspiracy charged was formed within the district and that certain overt acts in pursuance thereof were committed within the district.* Upon either of the latter two grounds, the court had jurisdiction of the offense.

Hyde v. *United States,* 225 U. S. 347, 356–367.
Brown v. *Elliott,* 225 U. S. 392, 400.
Lucas v. *United States* (C. C. A., 8th), 275 Fed. 405, 406.
Brolaski v. *United States* (C. C. A., 9th), 279 Fed. 1, 2.
Rudner v. *United States* (C. C. A., 6th), 281 Fed. 516, 519.
Jianole v. *United States* (C. C. A., 8th), 299 Fed. 496, 498.
Latham v. *United States* (C. C. A., 4th), 2 F. (2d) 208, 210.

(c) The question of whether the seizure was within treaty limits was one of fact decided against the defendants by both courts below

If the seizure were unlawful because in contravention of the treaty, there might be merit in petitioners' claim that the admission at the trial of testimony relating to the seizure constituted reversible error, for that testimony undoubtedly had a vital bearing on the question of the defendants' innocence or guilt. But, as above indicated, the seizure was fully sanctioned by the treaty, unless made beyond treaty limits. As to the place where the seizure was made, which was solely a question of fact, both courts below agreed that the testimony on behalf of the United States showing the seizure to have been made 5.7 nautical miles from a coast of the United States, and that in excess of that distance could be traversed in one hour by the communicating motor boat *C–55*, must be accepted as conclusive on that point notwithstanding the contradictory testimony on behalf of the defendants. Manifestly, a claim of error as to a conclusion of fact, in which both courts below joined, affords no basis for the allowance of a writ of certiorari.

(d) The treaty does not require that the speed of the communicating vessel be determined under substantially identical conditions

Regarding the provisions of paragraph (3) of Article II of the treaty, that in cases where it is intended that the liquor shall be conveyed to the United States by a vessel other than the one

boarded and searched, " it shall be the speed of such other vessel " which shall determine the distance from the coast at which the rights conferred by that Article shall be exercised, petitioners urge that the speed of such other vessel must be determined under conditions substantially identical with those existing at the time of the seizure. In support of this assertion they cite the decision of the District Court of the United States for the District of Connecticut in the *Over the Top,* 5 F. (2d) 838, and urge that this diversity of opinion between circuits should be corrected by this Court upon a writ of certiorari granted. But the rule is well settled that the diversity of decision between circuits which will justify the allowance by this Court of a writ of certiorari is a diversity between decisions of circuit courts of appeals and not between a circuit court of appeals and a district court. That the construction of paragraph (3) contended for by petitioners is without merit, is abundantly made clear by the following language of the Circuit Court of Appeals upon this point (R. 854–855):

> We do not find any qualifying words after " vessel " such as " when loaded " or " under conditions of wind and tide prevailing at the time of seizure." We should not read into the treaty limitations which have not been written therein. The Courts of this country should be careful not to fritter away by construction concessions secured by the State Department for the purpose of com-

bating the rum running abuse. The treaty, fairly construed, embodies the consent of Great Britain that her ships may be searched and seized under proper conditions within such a distance from our shores as can be traversed in an hour by any of the boats on which they discharge their liquor. The evidence shows that the *C 55* can traverse 6.6 knots within that time. The *Quadra* was therefore subject to search and seizure if she was within 6.6 miles of the Farallones.

II

CONTENTIONS NOT BASED UPON TREATY

(a) The admission or exclusion of evidence is for the court

Petitioners complain of the refusal of the District Court to submit to the jury the question of whether the *Quadra* was seized within the treaty limits. That question arose upon objection by the defendants, during the trial of the conspiracy charge, to the introduction by the Government of evidence relating to the seizure of that vessel, on the ground that such seizure was illegal because in contravention of the treaty. The District Court ruled that all evidence relating to the seizure was received solely for the information of the court to enable it to determine whether that evidence was admissible. (R. 110, 134, 602–603.) That ruling was affirmed by the Circuit Court of Appeals (R. 854), and was in full accord with the views recently expressed by this Court in *Steele* v. *United States*

No. 2, 267 U. S. 505, which was a prosecution under the National Prohibition Act in which one of the questions raised by the assignments of error was whether the defendant had the right to have submitted to the jury the issue of fact whether there was probable cause for the issuance of a search warrant upon which certain whiskey introduced in evidence by the Government was seized. Holding that there were two answers to this assignment, the first of which was that the question was *res judicata* in view of the finding by the District Court of probable cause for the issuance of the same warrant in a previous proceeding in which the plaintiff in error had petitioned for a return of the seized property, this Court said (p. 511):

> The second answer is that the question of the competency of the evidence of the whiskey by reason of the legality or otherwise of its seizure was a question of fact and law for the court and not for the jury. *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 103; *Bartlett* v. *Smith*, 11 M. & W. 483; *Doe dem. Jenkins* v. *Davies*, 10 Ad. & El. N. S. 314; 5 Wigmore Evidence (2d. Ed.) Sec. 2550.

(b) Evidence respecting the "Norburn," the marked dollar bills, and the telegram of Belanger

The remaining contentions advanced by petitioners deal with the affirmance by the Circuit Court of Appeals of the action of the District Court in admitting in evidence: (1) Certain testimony for the Government of the defendant Sam Crivello

as to his securing about May 1, 1924, under employment of the defendant Quartararo, a boat load of intoxicating liquor from the steamer *Norburn;* (2) testimony regarding certain one-dollar bills with notations thereon in the handwritng of the defendant Quartararo, and (3) a telegram sent by the defendant Belanger. Relying upon a provision in paragraph 5 (b) of Rule 35, which this Court has stated indicates a ground which will be considered by it in determining whether a writ of certiorari shall issue, petitioners assert that the rulings of the Circuit Court of Appeals referred to constitute decisions of that court upon important questions of general law probably untenable and in conflict with the weight of authority.

As to the *Norburn* testimony, petitioners urge that it concerned a conspiracy which was separate and distinct from the one charged in the present indictment, which related solely to the steamer *Quadra,* and that the testimony of Crivello regarding his trip to the *Norburn* was therefore erroneously admitted by the District Court over the defendants' objection. It is to be noted, however, that the present indictment does not charge a conspiracy confined to the actions of the steamer *Quadra* and those on board of that vessel. On the contrary, the indictment charges that the defendants—

> did * * * on the first day of January, 1924, the real and exact date of which is to

> this grand jury and to these grand jurors unknown, and continuously at all times thereafter up to and including the date of the filing of this indictment, * * * willfully conspire * * * together and with diverse other persons whose names are to these grand jurors and to this grand jury unknown, to commit certain offenses against the United States, that is to say: * * *.

The indictment then charges that the conspiracy was to willfully, feloniously, etc., sell, import, transport, etc., intoxicating liquors within the United States for beverage purposes in violation of the National Prohibition Act, and to willfully and feloniously, etc., import and bring, and to assist in importing and bringing, into the United States merchandise contrary to law in violation of Section 593, Subdivision (b) of the Tariff Act of 1922. The reference to the *Quadra* in the indictment was merely set out as one of several overt acts alleged to have been committed in furtherance of the conspiracy.

The testimony of Sam Crivello, appearing on pages 216–235 of the record, shows that about April or May, 1924, the witness, under employment of the defendant, Quartararo, visited the steamer *Norburn,* outside the Farallones, in the gasoline launch *California* and brought back a boat-load of intoxicating liquor from that steamer which the witness delivered to Quartararo at Oakland Creek, San

Francisco (R. 217–220); that about the same time and under the same employment the witness brought in another boatload of intoxicating liquor from the *Norburn* in the motor boat *Skidaddle*, which motor boat was furnished him by Quartararo; that the witness made another similar trip and delivery about the middle or the last of May, at which time, however, he used the *California* (R. 231); that beginning with the first of August, 1924, the witness made approximately eight trips in the *California* out to the steamer *Malahat* and brought in about 800 to 1,000 cases of intoxicating liquor each trip and delivered said liquor at Oakland Creek in the presence of Quartararo, who paid his wages (R. 226–230); that in the early part of September, 1924, the witness made another trip in the *California* out to the *Malahat*, but being unable to fill his order from that vessel, the master of the *Malahat* gave him an order on the master of the *Quadra* for intoxicating liquors to complete his order and that upon presentation of said order he received from the *Quadra* 49 to 50 cases of such liquor, whereupon he proceeded with his full load to Oakland Creek and delivered it to Quartararo (R. 226–227); that he was introduced at Quartararo's place of business to one "C. H.," whom the witness pointed out in the court room as the defendant Belanger; and that at Belanger's request the witness took some empty sacks out to the *Quadra* (R. 227–228). In

view of this evidence it is clear that the Circuit Court of Appeals committed no error in holding that the testimony regarding Crivello's first trip to the *Norburn* was admissible as tending to show a conspiracy to import intoxicating liquors for beverage purposes in which Belanger and his corporation were original parties or to which they and the crew of the *Quadra* subsequently adhered.

Regarding the marked dollar bills, there was testimony on behalf of the Government by A. F. Pearson, chief teller of the Bank of Italy at San Francisco, that in November, 1924, he had a conversation at that bank with the defendant Quartararo with reference to the redemption of some one-dollar bills; that the witness told Quartararo that if he brought the bills in the witness would tell him whether they could be redeemed; that about two or three days later a man—the witness did not recall whom—brought to the bank some torn dollar bills and left them with the witness; that that afternoon the witness pasted some of the bills together and had another man do the remainder; and that subsequently the bills were turned over by the witness to one Hoskins, a teller of the bank. (R. 240–244.) Hoskins testified that he saw Quartararo in the bank talking to the chief teller but did not overhear the conversation; that the torn dollar bills were first shown to him some time Monday morning, but he didn't know who brought them there; and that

after they were pasted together he took them down to the Federal Reserve Bank which redeemed them for $83.00. (R. 238–240.) The Government thereupon introduced the testimony of several witnesses who identified Quartararo's handwriting upon the signature card of his personal account in the Bank of Italy, upon two checks drawn on that account by Quatararo, and upon Quatararo's affidavit of registration. Photostat copies of these papers were, by leave of court, introduced by the Government as exhibits. (R. 245–251.)

The Government also introduced the testimony of E. A. Heinrich, who, after qualifying as an expert in handwriting, testified that upon a comparison of the aforesaid exhibits with certain marks and writings on the reverse side of the dollar bills (comprising lists of intoxicating liquors, R. 861), it was his opinion that they were in the handwriting of Quartararo (R. 265–278.) There appears to be no other evidence in the record to connect the exhibits with the conspiracy charged, and Circuit Judge McCammant, who wrote the majority opinion of the Circuit Court of Appeals, dissented from the majority on the ground that the introduction of this evidence was prejudicial to Quartararo. (R. 859–862.) But, as above shown, the evidence connecting Quartararo with the conspiracy charged in the indictment was otherwise so abundantly proved that the alleged error complained of, as-

suming that such error existed, could not, in view of Section 269 of the Judicial Code as amended by the Act of February 16, 1919, c. 48 (40 Stat. 1181), be regarded as sufficiently prejudicial to justify a reversal of the conviction of Quartararo.

The Government was permitted, after both sides had rested, to reopen the case for the purpose of introducing the following telegram (R. 863–864):

San Francisco, *June 24/24.*

Geo. Norgan,
Room 1052, Biltmore Hotel,
Los Angeles, Calif.:

Merchandise not yet reached market. Therefore cannot report anything different. Stop. Have appointment with Vince tomorrow, who will make proposition in morning. Things shaping good. Regards.

C. H.

The original of this telegram was in typewriting. The agents of the telegraph company took the name of the sender as "C. H. Belanger, Somerton Hotel," and evidence was received that the defendant Belanger was registered at said hotel on that day. (R. 563–564.) It was the Government's theory that the telegram, which was addressed to a director in the Canadian corporation which owned the liquor cargoes of the *Quadra,* the *Malahat,* and the *Coal Harbour,* was sent by Belanger, that the word "merchandise" meant intoxicating liquor, and that the word "Vince" meant Vincent Quartararo. Counsel for Belanger objected to the introduction of the telegram, and the objection be-

ing overruled, offered proof which did not deny the authenticity of the telegram but tended to show that it did not relate to any liquor transaction. (R. 566–591.) This raised a question for the jury as to the purpose of the telegram, and all the evidence relating to it was submitted to the jury with the other evidence in the case. In passing upon the question of the admissibility of this evidence the Circuit Court of Appeals said (R. 865):

> We think the circumstances were sufficient to constitute a *prima facie* authentication of the wire and that it was properly received.

Petitioners insist that the receipt in evidence of this telegram was improper as being in no way connected with the conspiracy charged. Even upon the assumption that this were so, Belanger's connection with the conspiracy was so clearly shown by other testimony in the record that the alleged error could work no prejudice as to him.

It follows that petitioners' claim that, aside from the treaty questions said to be involved, the case presents important questions of general law decided by the Circuit Court of Appeals contrary to the weight of authority, is without merit.

CONCLUSION

As no substantial question of law requiring a construction of the treaty with Great Britain is involved, and the nontreaty questions presented, whether rightly or wrongly decided, are of insuffi-

cient general importance to warrant the allowance by this Court of a writ of certiorari, it is submitted that the application for the writ should be denied.

Respectfully,

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

JOHN J. BYRNE,
Attorney.

MARCH, 1926.

○